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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

MERNER LUMBER AND HARDWARE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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NO. 19349

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

MERNER LUMBER AND HARDWARE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE EARL WARREN AND TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Merner Lumber and Hardware Company, respectfully prays for a Writ of Certiorari to review and reverse the decision and judgment of the United States Court of Appeals for the Ninth Circuit upholding and enforcing, in the case of National Labor Relations Board v. Merner Lumber and Hardware Company (No. 19349),

an order (attached hereto in Appendix I and contained in the transcript certified to this Court, Vol. I, p. 70) issued against petitioner by the Board on January 15, 1964.

OPINION AND GROUNDS FOR CERTIORARI

The opinion of the Court of Appeals, which has not been reported but a true copy of which is attached hereto in Appendix II and is contained in the transcript certified to this Court (Vol. I, pp. 87-89), was filed on May 10, 1965. The judgment and decree of the Court of Appeals was originally filed on June 4, 1965, but a timely Petition for Rehearing was filed and was not denied until June 22, 1965. The grounds being urged for certiorari are that the summary judicial review ordered by the Court, as reflected both in its opinion and its denials of motions made by petitioner, is in conflict with decisions of this Court, departs so far from the accepted and usual course of judicial proceedings in this type of case as to call for an exercise of this Court's power of supervision, and has resulted in the incorrect decision of or failure to consider important questions as to which the applicable decisions are in conflict or

unclear and adequate consideration by this Court has not been, but should be, undertaken.

JURISDICTION

The jurisdiction of this Court in the matter is found in Section 10(e) of the National Labor Relations Act, as amended by 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 160(e).

QUESTIONS PRESENTED

The questions presented in this petition are:

1. Did the Court of Appeals, without reference to the merits, depart from the established standard of judicial review and the accepted fair and orderly procedure in cases of this type?

2. Did the Court of Appeals apply an erroneous standard of review in considering the propriety of the Board's determination as to the appropriateness of the bargaining unit?

3. Did the Court of Appeals incorrectly decide or fail to consider the important question of whether the majority

status of a union is necessarily controlled by, and may be found by the Board on the basis of, employee signatures of designation cards, regardless of the circumstances surrounding the signatures?

4. Did the Court of Appeals incorrectly decide or fail to consider an important question as to the effect of a good faith doubt of an employer concerning the appropriateness of a bargaining unit or the majority status of a union?

5. Does the application of the proper standard of judicial review require a rejection of the Board's determination as to the unlawful character of the discharges of employees?

STATUTES

The statutory provisions involved are those contained in the National Labor Relations Act (hereinafter called "the Act"), as amended by 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, et seq., particularly the provisions of Sections 7, 8, 9, and 10 of the Act quoted in Appendix III hereto.

STATEMENT OF THE CASE

For the sake of brevity, petitioner will at this juncture undertake to depict

only the general posture of the case, postponing until the appropriate portions of the argument a consideration of more detailed facts and evidence. The factual material set forth under this heading may fairly be said to be essentially undisputed and may in the main be readily found in the relatively brief intermediate report filed by the Trial Examiner in the matter, thus eliminating the need to cite portions of the transcript of the evidence heard by him. Any citation of the record necessary with respect to a departure from or addition to the Examiner's report will be specially noted. The report, cited herein by its own page numbers, is contained in Volume I of the transcript certified to this Court, pp. 10-24. The citation "R." refers to the transcript of the testimony heard by the Examiner, contained in Volume II of the transcript certified to this Court and cited herein by its own pages. Exhibits introduced before the Examiner are cited herein and are contained in Volume III of the transcript certified to this Court. The citation "Sup. Tr." refers to the supplementary transcript of proceedings in the Court of Appeals.

At all relevant times, petitioner was a California corporation operating

two lumber and hardware stores in that state, one in Palo Alto and the other four miles away in Redwood City. In the summer of 1961, petitioner found itself in serious financial straits and, in the hope of survival, turned the control of its affairs over to a firm specializing in efficient management, with the result that Victor Riches became Executive Vice President of petitioner and undertook various personnel, organizational, and operational changes which continued for years and were designed to make petitioner a profitable enterprise.

By union activity antedating the managerial change, some of petitioner's employees at each store were represented by labor organizations, but not the sales and clerical personnel of either store. In the middle of November 1962, apparently as the result of discontent at the Palo Alto store, Irving Wilcox, a hardware salesman at that store, called William Tupper, a representative of the Retail Stores Employees Union, Local 428, Retail Clerks International Association, AFL-CIO. Tupper and another union representative, John Blaiotta, talked to or met with seven employees, including Wilcox, Wilbert Bentley, Burnell Walker, and William McBrearty. All of these

employees except Walker signed cards whose purpose, as will be seen, is in controversy, and the union representatives left blank cards to see if other employees at the Palo Alto store would sign. By the end of November, 16 such cards had been signed.1/

On December 7, 1962, Blaiotta visited Riches and demanded that petitioner recognize and enter into collective bargaining with the union. Blaiotta claimed that a majority of the employees at the Palo Alto store had designated the union as their bargaining agent and displayed some cards but did not offer them for examination. Instead he handed Riches a letter which was written by officers of the union to petitioner and read as follows:

> "This is to advise you that the Retail Store Employees Union, Local 428 AFL-CIO has been designated as the collective bargaining representative by the majority

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1/ The Trial Examiner found that the number of the signed cards was 17, but, as the Board has conceded in the Court of Appeals (see Board's opening brief, p. 33), Walker did not sign a card.

of your retail and wholesale sales, clerical and other non-selling employees except lumber handlers, outside contract salesmen and teamsters.

"As such the union is the legally authorized agent of your employees with whom all matters of wages, hours and matters of working conditions must be negotiated.

"Accordingly it is our desire to meet with you at your earliest convenience for the purpose of negotiating a collective bargaining agreement covering all the employees mentioned above employed in your Palo Alto store.

"An acknowledgment of this communication is hereby requested together with an indication from you as to when the collective bargaining negotiations can commence."

G. C.'s Ex. 4

Blaiotta and Riches engaged in a lengthy conversation, the character of which is in dispute. Suffice it to say for purposes of this petition that Riches asked for an election to establish the majority status of the union and that he

refused to recognize or bargain with the union until such an election but that none was agreed upon.

It is also clear that petitioner at the time was still in financial difficulties, due in part perhaps to a road construction project begun early in the fall at the entrance to the Palo Alto store. This work impeded access to the store and was thought to have contributed to a decline in sales. The project was still in progress on December 7 and was not completed until later that month.

On December 8, 1962, petitioner discharged Wilcox, Walker, Bentley, and McBrearty. Another employee named Harry Engman was discharged on December 10.

On December 11, the union filed a charge of unfair labor practices with the Board, and the matter was subsequently heard for five days by the Trial Examiner, commencing on May 18, 1963. Petitioner was not represented by legal counsel at the hearing; Riches handled the presentation of its case.

The assertions made against petitioner and sought to be proved at the hearing were that, on December 7, 1962,

petitioner had refused to recognize and bargain collectively with the union representing a majority of petitioner's employees in an appropriate unit, that the employee discharges had been discriminatory and for the purpose of discouraging union membership, and that petitioner, by its refusal to bargain and its discharges, had been guilty of unfair labor practices prohibited by Section 8(a) (1), (3), and (5) of the Act.

The position of petitioner was that, on December 7, the sales and clerical personnel at the Palo Alto store did not in fact represent an appropriate unit; that the union did not in fact represent a majority of those employees; that, in any event, Riches had entertained good faith doubts as to the appropriateness of the unit and the majority status of the union; and that the discharges of employees had not been influenced by the unionization question and were nothing more than personnel changes resulting from the exercise of sound business judgment in recognition of the economic distress of petitioner and relative incompetence of the employees involved.

The Trial Examiner in his intermediate report made detailed findings

of fact which were in the main adverse to petitioner, concluded that petitioner had committed the unfair practices as alleged, and recommended an order directing petitioner to cease and desist from such practices, to recognize and bargain with the union, to post the customary notices in that connection, and to reinstate four of the discharged employees and make them whole for any loss of earnings during the period after dismissal.2/ The Board adopted these findings, conclusions, and recommendations and issued its order and decision accordingly. The Board then filed its petition for enforcement of its order by the appropriate Court of Appeals under Section 10(e) of the Act, and petitioner answered.

After its answer petitioner for the first time retained the services of legal counsel and thereafter made a motion before the Court to adduce additional evidence pursuant to the provisions of Section 10(e) of the Act. This motion was

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2/ Wilcox was reemployed almost immediately after his discharge, and the Trial Examiner so found, but he inadvertently determined that Wilcox had thereafter remained in petitioner's employ until the time of the hearing whereas the fact is that Wilcox resigned after being rehired.

denied by order dated December 28, 1964. (Sup. Tr.) A subsequent order to augment the record before the Court so as to include an omitted portion of the record before the Board was also denied, on April 30, 1965. (Sup. Tr.) Then followed the Court's opinion and decree enforcing the Board's order, and petitioner, after first seeking unsuccessfully for a rehearing, determined to seek relief in this certiorari proceeding.

ARGUMENT

I. The Court of Appeals, Without Reference to the Merits, Departed from the Established Standard of Judicial Review and Accepted Procedure in Cases of This Type.

It is respectfully urged that the Court of Appeals failed to fulfill the responsibility of review conferred upon it by Section 10(e) of the Act. Its opinion, its denial of petitioner's motion to augment the record, and its denial of petitioner's motion to adduce additional evidence are each illustrative -- without reference to the merits of the respective positions of the parties -- of such a summary approach in a vital area of the law that this honorable Court should, in

the interest of orderly administration of justice, take this opportunity to cement fidelity by the Courts of Appeals to the overseeing functions allotted to them by Congress in a field which, for day-to-day significance in the lives of our citizens, has few rivals throughout the country.

A. The Court's Opinion

When it is remembered that the Court of Appeals was called upon to review a hearing lasting five days, involving a variety of difficult factual and legal issues, and resulting in extensive briefing by both sides, the lick-and-a-promise treatment accorded the matter by the Court in its three-page opinion is, to say the least, disillusioning. How much more is one led to expect by a reading of this Court's decision in, for example, Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951) where it was concluded that, in order to overcome the inclination of some appellate courts to act as a rubber stamp for the Board and to assure judicial responsibility and uniform practices in an important field, Congress had placed upon the appellate courts the duty of determining whether Board action was supported by substantial evidence in the record considered as a whole. As this Court there

said, "The . . . charges that the Board's findings were unsupported by substantial evidence imposes on this Court a duty to review the entire record and we must take into account in estimating the substantiality of the evidence . . . whatever in the record fairly detracts from its weight." (340 U.S. at p. 488.)

The present opinion, of course, acknowledges the above standard of review and states that it is being applied, but all else in the opinion suggests the contrary. Of the various contentions made by petitioner, the Court mentions only three, omitting, for example, all reference to the decisive consideration of whether or not the union in fact had majority status on December 7, 1962, a point which petitioner had stressed in its brief (see Brief of Respondent, pp. 24-25). Of the three contentions mentioned by the Court, only one (concerning appropriateness of the unit) is even so much as cursorily considered; the other two, once stated, are ignored for the remainder of the opinion. No effort to summarize the record, either pro or con, is made with respect to any point, the Court contenting itself with the observation that a recitation of the evidence it deems substantial and of the considerations leading to its affirmance of the

Board's determination as to the appropriateness of the unit "will not add precedent value to this opinion and is therefore omitted."

Petitioner is aware that appellate courts cannot be expected to go into unnecessary detail in resolving these matters, but an opinion such as the present one is tantamount to none at all and makes a mockery of the type of judicial review contemplated by Congress and explained in Universal Camera. The intent, of course, was not merely to assure adequate review in cases of "precedent value" but in all cases. As was recognized in Universal Camera, this Court cannot undertake to grant certiorari for the sole purpose of reassessing a record, and it is thus particularly important that the Courts of Appeals conscientiously perform the judicial function intended by Congress. If this Court does not exercise its supervisory power where, as here, a reviewing court chooses to do nothing more than state that a recitation of pertinent evidence and considerations "will not add precedent value and is therefore omitted," there will soon be no meaningful review of Board action, and the standard requiring examination of the entire record will become an empty phrase for ready lip service rather than,

as intended, a vehicle assuring careful scrutiny by the courts.

B. The Denial of the Motion to Augment the Record.

Also illustrative of the lack of a meaningful review is the fact that the Court of Appeals denied petitioner's motion to augment the record. By an inadvertent error in the Board's letter of transmittal of the record to the Court, a portion of the record before the Board was omitted, namely, the first 23 pages of the document filed by Riches to set forth petitioner's exceptions to the Trial Examiners report, the document entitled "Respondent's Arguments in Support of His Exceptions to the Intermediate Report and Recommended Order of Trial Examiner and His Conduct of the Hearing." The omitted material contained, among other things, documentation of the fact (see pp. 4-5) that, after the union's charge against petitioner had been filed, an investigator for the Board had inquired into the charge and determined that petitioner had not committed any unfair labor practice. Obviously, a court cannot comply with the established standard of review unless the entire record is before it, and the unfortunate ruling of the Court in this case confirms the failure

of proper review reflected in its opinion.

C. The Denial of the Motion to Adduce Additional Evidence.

A departure from fair and orderly procedure of another sort but no less significant of the Court's arbitrary attitude in the matter appears from its denial of petitioner's motion to adduce additional evidence. In part the motion related to evidence that the discharged employees were dismissed for business reasons and were unsatisfactory workers, but, perhaps more important, the purpose of the motion was to enable proof that, on December 7, 1962, the union was not in fact validly authorized to bargain on behalf of a majority of the 29 employees found by the Trial Examiner to constitute an appropriate unit. In support of the motion (Sup. Tr.), petitioner offered affidavits of three employees who had signed designation cards. All of them averred that they had signed with the understanding that the purpose was to bring about an election, and two expressly stated that they were told the signature would not mean the union would be a bargaining agent. As will be hereinafter discussed in more detail under heading III of this petition, such evidence is competent under the proper rule,

and the elimination of three of the 16 cards signed would obviously mean that the union had valid designations from less than a majority of the 29 employees involved.

Section 10(e) of the Act, under which the motion was made, no doubt contemplates that such motions are addressed to the sound discretion of the courts, but the denial in the present circumstances, where the additional evidence would have been decisive of the issue of an unlawful refusal to bargain, cannot be justified as a sound exercise of discretion, particularly when it is recalled that petitioner was without the guidance of legal counsel at the time of the hearing before the Trial Examiner.

II. The Court of Appeals Applied An Erroneous Standard of Judicial Review In Considering the Propriety of the Board's Determination As to the Appropriateness of the Bargaining Unit.

As discussed above under heading I, the Court of Appeals failed in general to apply the established standard of judicial review or, for that matter, any standard consistent with the Congressional

intent as settled by decisions such as Universal Camera. However, this is particularly apparent with respect to the Board's adoption of the Trial Examiner's finding (required under Sections 8(a)(5) and 9(a) of the Act before the refusal to bargain could be held unlawful) that the sales and clerical employees at the Palo Alto store constituted an "appropriate" bargaining unit. The Court not only accorded the point the inadequate, cursory treatment characterizing the opinion as a whole, but specifically relied upon the proposition that the Board's determination in this respect must be upheld unless "arbitrary and capricious."

Petitioner submits that this language is suggestive of the existence of a special standard of judicial review as to determinations of appropriateness, a standard which can be understood to be different from and inconsistent with the standard established in Universal Camera. Such a determination may not be "arbitrary and capricious" in the sense that it is devoid of any support in the record, and yet it may be rejected if the record is considered in its entirety, including the portions pointing in the opposite direction.

There is ample authority (one case is cited by the Court of Appeals here) applying the "arbitrary and capricious" test to determinations of appropriateness. This approach originates in cases antedating Universal Camera (e.g. May Department Stores Co. v. National Labor Relations Board, 326 U.S. 376 (1945) and has been repeated after Universal Camera, sometimes in cases also mentioning the record-as-a-whole test. (National Labor Relations Board v. B. H. Hadley, Inc., 322 F.2d 281 (C.A. 9, 1963); National Labor Relations Board v. Deutsch Company, 265 F.2d 473 (C.A. 9, 1959) [cert. denied 361 U.S. 963]; National Labor Relations Board v. Moss Amber Mfg. Co., 264 F.2d 108 (C.A. 9, 1959).)

One case using the "arbitrary and capricious" test, Foreman & Clark, Inc. v. National Labor Relations Board, 215 F.2d 396 (C.A. 9, 1954), contains language to the effect that a determination of appropriateness is not subject to review in the same way as other Board action, that an employer has virtually no voice in the matter, and that the Board has such broad discretion that it is not even confined to the record made in the particular proceeding. On the other hand, it has been held that such a determination by the Board, although not

directly reviewable by courts, is subject to the usual judicial scrutiny if connected with a charge of unfair labor practices. (Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U.S. 146 (1941).

Petitioner has found no recent decision of this Court discussing the problem, and it is earnestly urged that such clarification is long overdue, that there is no sensible justification for retaining the "arbitrary and capricious" test as a special standard in this area, and that determinations of appropriateness, at least where connected with charges of unfair labor practices, should be reviewed in the same way as other determinations of the Board, i.e., on the basis of whether they are supported by substantial evidence in the record considered as a whole, including the matters tending to detract from the Board's action.

A proper review under the correct standard establishes the error of the Board's determination in this case. Employees of the same classifications as those sought to be organized at the Palo Alto store were only four miles away in petitioner's Redwood City store, and they were equally unrepresented by labor organizations. There was a frequent interchange of personnel between the two stores,

and both stores, although having different immediate managers, were under the same higher management. Both operated under common policies. There was single advertising and the same letterhead and telephone system, as well as joint use of trucks and making of deliveries. (For facts in this paragraph see Tr. Exam.'s Rep., p. 2; Resp.'s Exs. 5 and 53; R. 694.) Naturally, there are various decisions which, with less justification than is afforded by the present facts, have held in favor of a multi-location unit. (E.g. Mid-West Abrasive Company, Decision of the National Labor Relations Board, 145 N.L.R.B. No. 159, 55 L.R.R.M. 1209; Ben Pearson's, Inc., Decision of the National Labor Relations Board, 133 N.L.R.B. No. 84, 48 L.R.R.M. 1708; Proctor-Silex Corporation, Decision of the National Labor Relations Board, 131 N.L.R.B. No. 9, 47 L.R.R.M. 1954.)

Petitioner believes it fair to say that the only factor even remotely suggestive of a single-store unit is one of no importance in the circumstances of this case. It is true that there was no history of labor activity on a two-store basis, but it must be remembered that petitioner underwent a tremendous organizational change in the summer of 1961, principally characterized by the overall reforms

undertaken by Riches in common as to both stores, and that the history of union activity prior to that time was therefore meaningless. (C.f. Kroger Company, 88 L.L.R.B. 243, 1950.)

Even the Trial Examiner's Report (p. 2), upon which the Board's determination is based, demonstrates the error committed. The Examiner admitted that there was "little" to indicate the infeasibility of a two-store unit, that there would be "no difficulty" in recognizing the suitability of such a unit, and that such a unit might be viewed as the "optimum" one. The Examiner nevertheless insisted that employees at the Palo Alto store were a homogeneous group, but this adds nothing since, of course, any group within a larger "homogeneous" group may be called "homogeneous." Can it sensibly be said, for example, that a clerical at the Palo Alto store was more like the sales employees at that store than like other clerical workers at the Redwood City store, or that full-time workers at the Palo Alto store were more like the part-time employees there (who were included in the unit) than like other full-time workers having the same duties in Redwood City? And how, in view of

the interchange of personnel, could a single-store unit be defended on the ground of homogeneity when it would follow that employees would be under the jurisdiction of one union some of the time and under the jurisdiction of none or another union the rest of the time?

Perhaps the most remarkable thing about the Examiner's Report is that, although he said he found in favor of appropriateness for reasons which "will appear," the Report thereafter, so far as petitioner can discern, nowhere purports to give any such reasons. Petitioner submits that the true key to the Examiner's erroneous determination is to be found not in any reason that "will appear" but in his preceding thought that petitioner, by reason of unfair labor practices, "removes" from consideration what might "otherwise" be "the optimum unit." Petitioner has found no authority supporting this odd, punitive doctrine, which, at least as applied here, is a non sequitur since whether or not the refusal to bargain on December 7, 1962, constituted an unfair labor practice depends on whether or not the unit in question was appropriate.

In view of the foregoing, it seems clear that the adoption by the Board of the Trial Examiner's finding of appropriateness is not supported by substantial evidence in the record considered as a whole, that, to the contrary, the inappropriateness of the unit was established beyond reasonable doubt, and that the Court of Appeals' disposition of this point alone demonstrates its failure to review the case under a proper standard and the need for a hearing by this Court.

III. The Court of Appeals Incorrectly Decided or Failed to Consider the Important Question Whether the Majority Status of a Union Is Necessarily Controlled by, and May Be Found by the Board on the Basis of, the Number of Employee Signatures of Designation Cards, Regardless of the Circumstances Surrounding the Signings.

One of the important questions presented by this case is whether the signatures by employees of cards designating a union as bargaining representative may be treated by the Board as determinative of the issue of majority status, without regard to the circumstances under which the signatures were obtained. Petitioner submits that such a rule is improper.

it is impossible to tell whether the Court of Appeals incorrectly decided the question or simply chose to ignore it; but, in either event, the matter is in itself sufficient reason for a hearing by this Court. The importance of the subject is obvious, decisions of lower courts appear to be in conflict, and, so far as petitioner has been able to find, there is no controlling decision of this Court on the point.

In Joy Silk Mills v. National Labor Relations Board, 185 F.2d 732 (D.C. 1950), where it was held that questioning employees as to the circumstances under which they signed designation cards constituted an unfair labor practice, the proposition is advanced (at p. 743) that "an employee's thoughts (or afterthoughts) as to why he signed a union card and what he thought that card meant cannot negative the overt act of having signed a card designating a union as bargaining agent." (In accord National Labor Relations Board v. Gorbea, Perez & Morell, 300 F.2d 886 (C.A. 1); National Labor Relations Board v. Stow Mfg. Co., 217 F.2d 900 (C.A.2) [cert. denied 348 U.S. 964].)

On the other hand, in National Labor Relations Board v. Koehler, 328 F.2d

770 (C.A. 7, 1964), the Court, in holding the Board's determination of majority status to be erroneous, rejected the signed cards as controlling or even sufficient to justify the Board's determination and based its conclusion on testimonial evidence that many employees had signed in the belief that the cards were to be used to obtain an election. (In accord Englewood Lumber Company, 130 N.L.R.B. 394).

The resolution of this conflict is critical here. As previously noted, the number of employees found to constitute the unit was 29, and 16 employees signed the cards designating the union as bargaining agent.3/ Thus, the invalidation of two or more of the cards would destroy the claimed majority, and, at the hearing before the Trial Examiner, two of the signing employees, Bentley and Warren, testified in effect that they (like the employees in Koehler) had signed for the purpose of obtaining an election. (R. 250, 251, 610, 611.) This testimony was corroborated by a third employee,

3/ The cards read: "I hereby authorize [the union] to represent me as my collective bargaining agent to negotiate with my employer concerning wages, hours and other conditions of my employment." (Gen. Coun.'s Exs. 3A-3R.)

Walker, in explaining the circumstances of a signature which he believed he had given but which he later acknowledged he had not. (R. 217, 219, 232, 233.) The force of such testimony is virtually undeniable when it is considered that two of the witnesses, Bentley and Walker, must be viewed as hostile to petitioner in the proceedings since they were among the employees who were assertedly subjected to unlawful dismissal. Moreover, Bentley obtained the signatures of at least eight other employees (R. 252, 257), undoubtedly conveying to them his understanding of the purpose thereof, and it must be kept in mind that, as discussed above under heading I-C of this petition, the Court of Appeals erroneously denied petitioner an opportunity to adduce additional evidence that three employees besides those already mentioned in this paragraph signed with the understanding that this was for the purpose of an election, not to designate a bargaining agent.

Apparently on the theory of the cases making the cards themselves decisive without regard to the surrounding circumstances, the evidence introduced at the hearing on the subject was swept aside as unworthy of consideration by the Trial Examiner, who stated to the Board that the cards were valid designations and that there was no "substantial

evidence" of a misapprehension by employees as to the purpose of the cards. (See Tr. Exam.'s Rep., p. 3, f.n. 1.) The Board, either motivated by the same theory or accepting the Examiner's false report without an independent look at the record, followed suit, and the Court of Appeals, both in affirming the Board's action on the present record and in denying the motion to adduce additional evidence, must either have applied the rule making the cards determinative or have arbitrarily closed its eyes to a decisive point in the case.

Petitioner earnestly urges that the correct rule is the one applied in Koehler, that, when that rule is applied here, the only reasonable conclusion is that the union did not in fact have majority status as required under Section 9(a) of the Act before a refusal to bargain can be unlawful, and that the error of the Court of Appeals in this respect and the conflict in the decisions on the subject call for a hearing by this Court.

IV. The Court of Appeals Incorrectly Decided or Failed to Consider An Important Question As to the Effect of An Employer's Good Faith Doubts Concerning Appropriateness of a Bargaining Unit or the Majority Status of a Union.

Another important question presented in this case is whether an employer's refusal to bargain with a union can be held to be an unfair labor practice if the employer doubted in good faith the appropriateness of the bargaining unit or the majority status of the union. Petitioner submits that a finding of a violation in such circumstances is improper. Again, in view of the nature of the opinion of the Court of Appeals, there is no way of telling whether the Court incorrectly decided the point or simply failed to consider it, but, in either event, the matter calls for a hearing by this Court since the subject is an important one as to which there appears to be a conflict in the existing decisions.

There are some cases holding or recognizing that a good faith doubt by an employer as to the appropriateness of the unit or the majority status of the union is a defense to a charge that he unlawfully refused to bargain. (Edward Fields, Inc. v. National Labor Relations Board, 325 F.2d 754, 761 (C.A.2, 1963); see Snow et al v. National Labor Relations Board, 308 F.2d 687, 691 (C.A.2, 1963); National Labor Relations Board v. Trimfit of California, Inc., 211 F.2d 206, 209-210 (C.A. 9, 1954); cf. National Labor Relations Board v. Brown et al., (1965) 380 U.S.

278 [prelim. printing, Part II].)

On the other hand, some cases are authority for the view that such a good faith doubt is no defense to a charge of unlawfully refusing to bargain, at least if the employer is, subsequent to his refusal to bargain, guilty of conduct amounting to an unfair labor practice. (United Aircraft Corp. (Hamilton Standard Div.) v. National Labor Relations Board, 333 F.2d 819, 822 (C.A.2, 1964); see Florence Printing Co. v. National Labor Relations Board, 333 F.2d 289, 291 (C.A.4, 1964); National Labor Relations Board v. Keystone Floors, Inc., 306 F.2d 560, 563-564 (C.A.3, 1962).)

As discussed above under heading II of this petition, the conviction of petitioner is that the unit was in fact inappropriate. Certainly, the least that must be said is that even one with legal training would view the question as an extremely close one, and there is thus no reason to wonder at the testimony of Riches that, on December 7, 1962, he was bewildered as to the propriety of the unit claimed. The Trial Examiner nevertheless rejected this testimony, reasoning that the letter handed by Blaiotta to Riches on December 7 adequately described the unit. (Tr. Exam.'s Rep.,

p. 3, lines 32-33.) Obviously, however, an employer is not required to accept a unit as "appropriate" within the meaning of Section 9(a) of the Act merely because the union adequately describes the group.

So far as concerns the majority status of the union, even the Trial Examiner in effect conceded that Riches has a "serious" doubt that the union had been designated as bargaining agent by enough employees. However, the Examiner went on to reason -- in accordance with some of the cases cited above and with the apparent approval of the Board -- that, by unlawfully discharging employees on December 8 and 10 in order to frustrate a meaningful election, petitioner lost any right to claim good faith in refusing to bargain on December 7 and that the refusal, even if Riches genuinely doubted the majority status of the union at that time, was nevertheless unlawful and an unfair labor practice under the Act. (Tr. Exam.'s Rep. pp. 3-4.)

Petitioner submits that such a doctrine of retroactive wrongdoing, however much in accord with some authority, is untenable. Wrongful conduct subsequent to a good faith refusal to bargain may itself constitute an unfair labor practice but cannot revert back and magically

denude the refusal of its good faith character, thereby transforming it into yet another violation of the Act. The Court of Appeals should have so decided in accordance with the cases first cited under this heading, and its failure to do so and the conflict in the existing decisions justify a hearing by this Court.

V. Application of the Proper Standard of Judicial Review Requires Rejection of the Board's Determination That the Discharges of Employees Were Unlawful.

It is also clear that the failure to accord a proper review discussed under heading I of this petition resulted in an unwarranted affirmance of the Board's findings as to the unlawfulness of the discharges of employees. The evidence bearing on this subject is voluminous and is discussed at length in the briefs filed in the Court of Appeals, and it would be needlessly burdensome to this Court to repeat here in detail, but a few points merit emphasis:

(1) There was abundant evidence of economic necessity for the dismissals, including documentation of a net business loss by petitioner

during the last six months of 1962. (Resp.'s Ex. 18A.)

(2) The precarious condition of the business and a gradual change from a regular retail operation to a self-service store resulted in the termination of dozens of employees, including several soon after the dismissals in question here. (Resp.'s Exs. 8 and 20.)

(3) There was also abundant evidence that the employees in question were not satisfactory workers, and even the Trial Examiner (see his Rep. p. 8, lines 42-44, p. 10, lines 42-43) so found as to Engman, although nevertheless refusing to credit testimony that union affiliation was not the reason for Engman's discharge.

(4) There was no evidence that any employee was ever threatened with dismissal because of union affiliation, and some employees had been union members for a long time.

(5) The theory that the dismissals were due to union activity cannot sensibly be reconciled with the fact that the employee who initiated

the advent of the union, Wilcox, was immediately rehired when the continued need for his services was felt.

(6) An employer having business problems which require personnel changes is under no obligation to discriminate in favor of union members (Martel Mills Corporation v. National Labor Relations Board, 114 F.2d 624 (C.A.4, 1940); National Labor Relations Board v. Union Pacific Stages, 99 F.2d 153 (C.A. 9.), and the fact that pursuit of legitimate business ends may weaken or destroy effective labor activity does not render such conduct unlawful (National Labor Relations Board v. Brown et al., (1965) 380 U.S. 278 [prelim. printing, Part II]).

A reading of the Trial Examiner's report discloses that his findings of improper motivation are the result of no direct evidence but solely of speculation based on the dislike of Riches for union affiliation and the unwillingness to credit the testimony of Riches notwithstanding that it was corroborated and supported by other witnesses and by documentary proof. Of course,

neither a general inclination against unions nor the negative process of rejecting defensive testimony as incredible can fill gaps in the evidence required to satisfy the proponent's burden of proof.

It is submitted that the record, when considered as a whole, fails to support the Board's determination that the dismissals were unlawful.

CONCLUSION

Petitioner respectfully prays that, for each of the reasons discussed above, this Court issue a Writ of Certiorari and hear the matter and that, upon such a hearing, the decision and judgment of the Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX I

145 NLRB No. 105

D-5818
Palo Alto, Calif.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MERNER LUMBER AND HARDWARE COMPANY

and Case No. 20-CA-2493

RETAIL STORE EMPLOYEES UNION, LOCAL 428, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

DECISION AND ORDER

On August 9, 1963, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report with a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner.[1/]

Dated, Washington, D.C. JAN 15, 1964

Frank W. McCulloch, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

1/ The Recommended Order is hereby amended by substituting for the first paragraph therein, the following paragraph:

> Upon the entire record in this case, and pursuant to Sec. 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, its officers, agents, successors, and assigns, shall:

145 NLRB No. 105

APPENDIX II

No. 19349

In the

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MERNER LUMBER & HARDWARE COMPANY,

Respondent.

[May 10, 1965]

On Petition for Enforcement
of an Order of the
National Labor Relations Board

Before: HAMLEY, MERRILL and BROWNING, Circuit Judges PER CURIAM:

The National Labor Relations Board seeks enforcement of its order directing Merner Lumber and Hardware Company to cease and desist from certain asserted unfair labor practices and to take specified corrective action. The order in question resulted from agency proceedings in which it was found that the company had engaged in two unfair labor practices.

One of these unfair labor practices, the Board found, was in refusing, on December 7, 1962, to extend recognition to, and bargain with, Retail Store Employees Union, Local 428, Retail Clerks International Association, AFL-CIO (Union), as the representative of sales personnel and clerical workers at the company's hardware store in Palo Alto, California. This was held to be a violation of section 8(a)(5) and (1) of the National Labor Relations Act (Act), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(5) and (1) (1958).

The other unfair labor practice, the Board found, was the action of the company in discharging four employees on December 8, 1962, and one on December 10, 1962. All of these employees, the Board found, had been active in promoting the organizing attempt of the Union at the Palo Alto store. The Board concluded from this that the company discriminated in regard to the hire and tenure of employment of these employees to discourage membership in the Union. This was held to be a violation of section 8(a) (3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1) (1958).

The Board order requires the company to cease and desist from engaging in such practices, requires the company to

post the customary notices, and directs the company to reinstate and make whole four of the discharged employees, the fifth having been reinstated shortly after his discharge and having thereafter resigned.

Resisting the petition for enforcement, the company argues that the trial examiner's findings of fact, adopted by the Board, are not supported by substantial evidence on the record considered as a whole. Quite to the contrary, the company asserts, the substantial evidence required findings that: (1) the company refused to bargain because of its good faith doubt as to the appropriateness of the Palo Alto store as the bargaining unit, the company having another unorganized hardware store at Redwood City, California, four miles away; (2) the company also refused to bargain because of its good faith doubt as to whether the Union represented a majority of the sales personnel and clerical workers at the Palo Alto store; and (3) the company discharged the five employees in question because of economic necessity and also, in three cases, for cause, and not for the purpose of discouraging membership in the Union. With regard to the first of these issues, the company also contends that the Board acted

arbitrarily and capriciously in determining that the Palo Alto store is an appropriate bargaining unit.

Under section 13(e) of the Act, 29 U.S.C. § 160(e) (1958), the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole, shall be conclusive. Applying that test, we conclude that the challenged findings are supported by substantial evidence.

Under section 9(b) of the Act, 29 U.S.C. § 159(b) (1958), the Board has wide discretion in determining an appropriate bargaining unit. The Board's determination in this regard will not be set aside in the absence of a showing that such determination was arbitrary and capricious. See N.L.R.B. v. Dewey Portland Cement Co., 10 Cir.,336 F.2d 117, 119. We conclude that the Board did not act arbitrarily or capriciously in determining that the company's Palo Alto store is an appropriate bargaining unit.

A recitation of the evidence which we regard as substantial, considering the record as a whole, and of the considerations which lead us to conclude

that the Board did not act arbitrarily and capriciously, will not add precedent value to this opinion and is therefore omitted.

The petition for enforcement is granted.

APPENDIX III

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, et seq.) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * * *

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer---

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; ***

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: ***

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: ***

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: ***

* * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: ***

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: ***

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and

desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: ***

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief on restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall

apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent or agency, and to be made a part of the record. * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * * * *